82-1828

No.

Supt. U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether it was "appropriate," within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), to award attorneys' fees to a party who failed to prevail on any aspect of its challenge to the issuance of a permit by the Administrator of the Environmental Protection Agency.

II

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Montana Power Company, Washington Water Power Company, Puget Sound Power and Light Company, Portland General Electric Company and Pacific Power and Light Company were intervenor-respondents below. The interests of these parties are not implicated by the question presented in this petition.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Reasons for granting the petition 9

Conclusion 9

Appendix A 1a

Appendix B 5a

Appendix C 6a

TABLE OF AUTHORITIES

Cases:

Metropolitan Washington Coalition for Clean Air v. *District of Columbia*, 639 F.2d 802 7

Northern Plains Resource Council v. *United States Environmental Protection Agency*, 645 F.2d 1349 ..... 2, 5, 6, 7

Sierra Club v. *Costle*, 657 F.2d 298 4

Statutes and regulations:

Clean Air Act of 1977, 42 U.S.C. (Supp. IV) 7401 *et seq.*:

Section 111, 42 U.S.C. (Supp. IV) 7411 4

Section 111(a)(2), 42 U.S.C. (Supp. IV) 7411(a)(2) 4

Sections 160-169, 42 U.S.C. (Supp. IV) 7470-7479 2

Page

Statutes and regulations—Continued:

Section 162, 42 U.S.C. (Supp. IV) 7472 2
Section 163(b), 42 U.S.C. (Supp. IV) 7473(b) 2
Section 164, 42 U.S.C. (Supp. IV) 7474 2
Section 165, 42 U.S.C. (Supp. IV) 7475 ..... 2, 3
Section 165(a)(3), 42 U.S.C. (Supp. IV) 7475(a)(3) 3
Section 165(a)(4), 42 U.S.C. (Supp. IV) 7475(a)(4) 3
Section 169(2)(A), 42 U.S.C. (Supp. IV) 7479(2)(A) 3
Section 307(b)(1), 42 U.S.C. (Supp. IV) 7607(b)(1) 5
Section 307(f), 42 U.S.C. (Supp. IV) 7607(f) 1, 2, 7, 8, 9
28 U.S.C. 2414 8
40 C.F.R.:
Section 60.2 ..... 4, 5
Section 60.40(a) 4, 6
Section 60.41 4

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-4a) holding the Environmental Protection Agency liable for attorneys' fees is reported at 670 F.2d 847. The order of the court of appeals (App. B, *infra*, 5a) fixing the amount of those fees is unreported.

JURISDICTION

The judgment order of the court of appeals (App. B, *infra*, 5a) was entered on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), provides in pertinent part as follows:

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

STATEMENT

Following a wholly unsuccessful challenge to the issuance of a permit by the Environmental Protection Agency ("EPA") to a consortium of utilities headed by Montana Power Company allowing construction of two coal-fired steam electric generating units in Colstrip, Montana, respondent Northern Plains Resource Council ("NPRC") sought an award of attorneys' fees against the government under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). Although it had rejected every aspect of respondent's challenge to the permit, the court of appeals determined that NPRC was entitled to attorneys' fees. Before discussing the court's ruling on attorneys' fees, we briefly describe the underlying merits litigation. As the court of appeals noted, respondent raised "[t]wo rather technical issues" in that proceeding. *Northern Plains Resource Council* v. *United States Environmental Protection Agency*, 645 F.2d 1349, 1350 (9th Cir. 1981).

1.a. Part C, subpart I of the Clean Air Act, 42 U.S.C. (Supp. IV) 7470-7479, is designed to *p*revent *s*ignificant *d*eterioration ("PSD") of air quality in areas designated as having air quality better than that required by existing ambient air quality standards. Areas subject to PSD regulation are divided into three classes, and maximum allowable increases ("increments") in emissions for particulate matter and sulfur dioxide are established for each class.[1] Major

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[1]The areas are classified as Class I, Class II and Class III (42 U.S.C. (Supp. IV) 7472, 7474). The smallest allowable increases in pollution apply to Class I areas and the greatest apply to Class III areas (42 U.S.C. (Supp. IV) 7473(b)).

emitting facilities must secure a PSD permit prior to commencement of construction of a new plant or modification of an existing plant (42 U.S.C. (Supp. IV) 7475). Among other things, a permit applicant must show that emissions from operation of the new or modified plant will not cause or contribute to a violation of the applicable maximum allowable increase or "increment" (42 U.S.C. (Supp. IV) 7475(a)(3)). Furthermore, the facility must utilize the "best available control technology" to limit emissions (42 U.S.C. (Supp. IV) 7475(a)(4)). Although best available control technology determinations must take into account energy, economic and other factors, emissions may not exceed the emissions limitations incorporated in any new source performance standard ("NSPS") promulgated by EPA that is applicable to the industrial category to which the source belongs (42 U.S.C. (Supp. IV) 7475(a)(3)).[2]

Whether any given major emitting facility is subject to the PSD provisions of the Act turns on whether it "commenced construction," as defined in Section 169(2)(A) of the Act, 42 U.S.C. (Supp. IV) 7479(2)(A), prior to the effective date of those provisions. PSD review is required unless the owner or operator of the facility is able to demonstrate that (1) all permits under federal, state and local air pollution laws have been received and a continuous program of physical on-site construction has begun or (2) the owner or operator has entered into binding agreements or contractual obligations that cannot be cancelled or modified without substantial loss (42 U.S.C. (Supp. IV) 7479(2)(A)). In contrast to the definition of "commenced construction" for purposes of new source performance standards, discussed below, the statutory definition of that term for PSD purposes applies to the entire plant rather than to particular pieces of equipment within a plant.

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[2]The provisions of the Act pertinent to new source performance standards are explained at pages 4-5, *infra*.

b. Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, requires EPA to set performance standards limiting emissions from new or modified air pollution sources that reasonably may be anticipated to endanger the public health or welfare. Section 111(a)(2), 42 U.S.C. (Supp. IV) 7411(a)(2), defines a "new source" as any stationary source the construction or modification of which commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance that is applicable to such source. Unlike the PSD provisions, however, the new source provisions of the Act contain no statutory definition for the term "commenced construction." Accordingly, EPA promulgated regulations providing that construction will be deemed to have commenced if the owner or operator of the source has entered into a "contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction * * *" (40 C.F.R. 60.2).

In 1971, EPA promulgated new source performance standards for fossil-fuel fired steam electric generators. EPA published proposed revisions to those standards on September 19, 1978, and adopted final revised standards on June 11, 1979. The final standards imposed more stringent emission limitations than those contained in the 1971 standards.[3]

New source performance standards apply to specific elements of process equipment, defined as "affected facilities," 40 C.F.R. 60.40(a), 60.41, and, in the case of fossil-fuel steam electric generating units, the "affected facility" is the boiler. Thus, for NSPS purposes, boilers on which construction commenced, in accordance with the regulatory

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[3]The 1979 regulations were upheld in *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981).

definition of that term, 40 C.F.R. 60.2, before September 19, 1978 (the date of publication of the proposed NSPS revisions), are subject to the 1971 NSPS.

2. In July 1976, a consortium of electric utilities headed by Montana Power Company applied to EPA for a permit to construct Units 3 and 4 of a four-unit steam electric generating complex in Colstrip, Montana.[4] On September 11, 1979, EPA granted a permit for Units 3 and 4.[5] Shortly thereafter, respondent filed a petition for review in the Ninth Circuit, and the utility consortium intervened on EPA's side to defend the permit.[6]

Respondent challenged EPA's issuance of a PSD permit to the consortium on two grounds. First, it claimed that the units would not utilize the "best available control technology" as required by the PSD provisions. Respondent argued that because actual on-site construction for Units 3 and 4 had not "commenced" before September 18, 1978, the units were required to comply with emission standards established by the 1978 proposed NSPS regulations instead of the 1971 regulations. Therefore, according to respondent, EPA's decision to allow the units to emit pollutants in excess of the 1978 proposed standards was unlawful. Respondent also claimed that EPA's decision to accept the

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[4]Colstrip Units 1 and 2 were completed in 1976. See *NPRC* v. *EPA*, *supra*, 645 F.2d at 1351.

[5]As described by the court of appeals, the permit proceedings, in which respondent participated, were protracted, in part because of intervening changes in the law. See *NPRC* v. *EPA*, *supra*, 645 F.2d at 1351-1352.

[6]Jurisdiction in the court of appeals was properly predicated on Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1), which provides that judicial review of "final action of the Administrator * * * which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."

control system proposed by the company to limit particulate emissions was without a rational basis because other available control technologies could achieve greater emission reductions.

The second aspect of respondent's challenge related to EPA's failure to "validate" the air quality dispersion model, used to predict the impacts of emissions from Units 3 and 4, with certain monitoring data proferred by respondent. Respondent argued that consideration of its data would have shown that emissions from the units would violate the applicable Class I PSD increment for sulfur dioxide at the nearby Northern Cheyenne Reservation.

The court of appeals rejected respondent's arguments and upheld EPA's decision in its entirety. *NPRC* v. *EPA*, *supra*. First, as to respondent's technological arguments, the court ruled that the applicable new source performance standard for Units 3 and 4 was that published in 1971. This conclusion was based on a finding that, with respect to Units 3 and 4, construction of the boilers had "commenced" in 1974, well before proposed revisions to the new source performance standards were published in 1978. See 40 C.F.R. 60.2, 60.40(a). Relying on the structure of the Clean Air Act and its legislative history, the court agreed with EPA that the applicable definition of "commenced construction" was the new source definition, which applies to "affected facilities," *i.e.*, the boilers, and rejected respondent's argument that the broader PSD definition of that term controlled (645 F.2d at 1355-1357).

As for EPA's approval of the emissions control technology for the units, the court agreed with EPA's position that the Act requires such determinations to be made on case-by-case basis. *NPRC* v. *EPA*, *supra*, 645 F.2d at 1359. Accordingly, the court held that even though another control technology might provide greater emissions reductions,

EPA's approval of the proposed system was not irrational in view of all the factors the agency is required to consider when making a technological judgment of that sort (645 F.2d at 1361-1362).

Finally, the court rejected respondent's challenge to the model utilized by EPA to predict emissions from the proposed units, holding that EPA's rejection of the monitoring data proferred by respondent was not irrational (*NPRC* v. *EPA, supra,* 645 F.2d at 1362-1363); indeed, the court noted that respondent's data was "completely irrelevant" (*id.* at 1363) to EPA's model.

3. After losing on every aspect of its challenge to the PSD permit, respondent moved for an award of fees[7] under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). In support of its motion, respondent argued that it was entitled to fees because, although it had not prevailed on any issues, the suit was of the type Congress sought to encourage, *i.e.*, it had been brought with the objective of protecting air quality and it had aided in the construction and implementation of the Act.

The court of appeals agreed with respondent's position (App. A, *infra*, 1a-4a). The court found that Congress "sought to facilitate challenges of EPA decisions in order to insure that EPA fulfilled its designated function of preserving air quality" (*id.* at 2a). Relying on *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981), the court stated "that in determining whether a party—prevailing or non-prevailing—can recover attorneys' fees under § 307(f) from the Government, the test is whether in light of what was known * * * when the action was instituted, the action was

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[7]Respondent did not indicate the amount of fees it sought.

of the type Congress sought to encourage when it authorized awards of attorneys' fees" (App. A, *infra*, 2a). The court concluded that respondent's action presented issues important to the construction of the Act and was, therefore, precisely the type of suit Congress wished to encourage in enacting Section 307(f) (App. A, *infra*, 3a).

The court allowed respondent 14 days in which to specify the size of its requested fee award and allowed EPA a like period of time in which to file an opposition. In April 1982, EPA and respondent ultimately agreed that $15,000 was a reasonable fee for respondent's unsuccessful litigation efforts. The parties stipulated, however, that EPA reserved its right to seek further review on the underlying question of entitlement to fees and moved the court to enter a final order to that effect.

The court took no immediate action on the parties' stipulation and motion.[8] By letter dated July 12, 1982, counsel for respondent inquired about the status of the matter (App. C, *infra*, 6a-7a), but the court did not respond. By October 18, 1982, the date on which this Court granted the government's petition for a writ of certiorari in *Administrator, Environmental Protection Agency* v. *Sierra Club*, No. 82-242 (argued Apr. 25, 1983), the court of appeals still had not entered any order in response to the parties' stipulation and motion. Accordingly, by motion dated October 25, 1982, the government asked the court of appeals to stay the entry of final judgment pending this Court's decision in *Sierra Club*. On March 3, 1983, the court denied the motion and ordered EPA to pay $15,000 in attorneys' fees to respondent (App. B, *infra*, 5a).

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[8]Even if the government had decided against seeking review in this Court, a final judgment from the court of appeals would have been required before the General Accounting Office would pay respondent's fee award. See 28 U.S.C. 2414. Thus, the case remained in limbo while the parties awaited the entry of final judgment by the court of appeals.

REASONS FOR GRANTING THE PETITION

This case raises precisely the same issue that is now pending before the Court in *Administrator* v. *Sierra Club, supra,* No. 82-242.[9] We have set forth our arguments against the construction of Section 307(f) adopted by the United States Court of Appeals for the District of Columbia Circuit in our briefs in *Sierra Club*, and the same arguments are fully applicable here.[10] Accordingly, this case will be controlled by the Court's decision in *Sierra Club.*

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Administrator* v. *Sierra Club*, No. 82-242.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1983

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[9]In the court below, the government also argued that, in the event any fee award was made, the intervenor-respondents should be required to share the costs of that award with EPA. The court of appeals rejected this argument (App. A, *infra*, 3a n.4). We doubt the correctness of the court's ruling, but we do not now seek this Court's review of that subsidiary issue.

[10]We are furnishing respondent's counsel with copies of our opening and reply briefs in *Sierra Club*, in which those arguments are set forth.

DOJ-1983-05

APPENDIX A

NORTHERN PLAINS RESOURCE COUNCIL, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

The Montana Power Company, the Washington Water Power Company, Puget Sound Power and Light Company, Portland General Electric Company, and Pacific Power and Light Company, Intervenors.

No. 79-7618

United States Court of Appeals, Ninth Circuit.

March 1, 1982.

Before TANG, SCHROEDER and NELSON, Circuit Judges.

ORDER

In *Northern Plains Resource Council* v. *EPA*, 645 F.2d 1349 (9th Cir. 1981), we affirmed the decision of the EPA. Subsequent to our decision, Northern Plains Resource Council (NPRC) filed for an award of attorney's fees pursuant to the Clean Air Act, § 307(f), 42 U.S.C. § 7607(f) (§ 307(f)). EPA opposes this request, primarily arguing that under the circumstances of this case an award of attorney's fees would be inappropriate.[1]

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[1]EPA also argues that NPRC's motion is defective because it was filed 55 days after judgment and because it does not specify the amount of fees sought. The costs of litigation covered by § 307(f) are not the same costs this court is authorized to award under Fed. R. App. Pro. 39. Therefore, Rule 39's 14-day time limit for filing costs bills does not

DISCUSSION

Section 307(f) provides that "in any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney's and expert witness's fees) whenever it determines that such an award is appropriate." As EPA recognizes, Congress, by adopting this section of the Clean Air Act, did not intend to limit the award of attorney's fees to the "prevailing party."[2] Instead, Congress sought to facilitate challenges of EPA decisions in order to insure that EPA fulfilled its designated function of preserving air quality. See *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981). We agree with the D.C. Circuit that in determining whether a party—prevailing or nonprevailing—can recover attorney's fees under § 307(f) from the Government, the test is "whether in light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorneys' fees." *Id.*

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apply to motions for attorney's fees filed pursuant to § 307(f). Because prior to October 1, 1981, there was no prescribed time limit for filing a motion for attorney's fees, NPRC's motion was not untimely. *Cf.* Local Rule 14(g) (effective October 1, 1981, requests for attorney's fees must be filed within 30 days of entry of judgment); *cf. also* Local Rule 13(b)(1)(E) (effective October 1, 1981, party must indicate in brief if attorney's fees will be sought).

We also refuse to reject NPRC's motion on the ground that it does not specify the amount of attorney's fees requested. Although the amount of attorney's fees requested should generally be included in a motion for attorney's fees, failure to specify the amount requested does not require denial of the motion.

[2]See H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 *reprinted in* [1977] U.S. Code Cong. & Adm. News 1077, at 1416 ("The committee did not intend that the court's discretion to award fees under [§ 307(f)] should be restricted to cases in which the party seeking fees was the 'prevailing party' ").

Applying this test in the instant case, we believe NPRC is entitled to an award of attorney's fees. Contrary to EPA's argument, at least two of the issues presented in this case had not been decided by this court prior to the institution of this suit.[3] Moreover, the interest of certain NPRC members in preserving the value of their property which might have been decreased if the power plants were built would not have been sufficient incentive to encourage the expenditures required by a suit of this type.

Because NPRC brought this suit to promote the quality of air resources, and because the suit presented issues important to the construction of the Clean Act Act, this is precisely the type of suit Congress sought to encourage by enacting § 307(f). An award of attorney's fees to NPRC is therefore appropriate under that section.[4]

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[3]As we indicated in our opinion, the precise issue presented in this case relating to "commenced construction" had not been considered by this court in *Montana Power Co.* v. *EPA*, 608 F.2d 334 (9th Cir. 1979). *Northern Plains*, 645 F.2d at 1357 n.24. Nor had this court decided the issue of the applicability of new source performance standards prior to institution of this suit. The fact that other courts considered this issue prior to the release of our decision in no way affects NPRC's entitlement to attorney's fees. See *Metropolitan Washingtion*, 639 F.2d at 804.

[4]EPA argues that if NPRC is awarded attorney's fees, it is entitled to contribution from intervenor Montana Power Company. However, there is no indication that Congress sought to require a prevailing intervening party to indemnify the party challenging an EPA decision. Instead, § 307(f) simply evinces a willingness on the part of Congress to have the Government bear the cost of litigation brought to promote air quality.

CONCLUSION

NPRC is entitled to attorney's fees under § 307(f). It will have 14 days from the entry of this order to file a motion specifying the amount of fees sought with supporting documents justifying the request. EPA will have 14 days from the date NPRC files its motion to file an opposition to NPRC's motion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL,	)	
Petitioner,	)	No. 79-7618
vs.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	*ORDER*
Respondent, and	)	
THE MONTANA POWER COMPANY, THE WASHINGTON WATER POWER COMPANY, PUGET SOUND POWER AND LIGHT COMPANY, PORTLAND GENERAL ELECTRIC COMPANY, and PACIFIC POWER & LIGHT COMPANY,	)	
Intervenors.	)	

[Filed: Mar. 3, 1983]

Before: TANG, SCHROEDER and NELSON, Circuit Judges

Respondent's motion to stay the award of attorney fees in this case is denied.

Petitioner is awarded the sum of $15,000 in attorney fees pursuant to the agreement of the parties.

APPENDIX C

PATTEN & RENZ

ATTORNEYS AT LAW
LOWER LEVEL ONE
FIRST CITIZENS BANK BUILDING
2812 1st AVENUE NORTH
BILLINGS, MONTANA 59101
(406) 252-6782

JAMES A PATTEN
JEFFREY T RENZ

OF COUNSEL
FRED N DUGAN

July 12, 1982

Mr. Richard Deane
Clerk of the Court
Ninth Circuit Court of Appeals
P. O. Box 547
San Francisco, California 94101

Re: *Northern Plains Resource Council v. EPA*, No. 79-7618

Dear Mr. Deane:

On March 1, 1982 the court in the above referenced action determined that the appellant, Northern Plains Resource Council, was entitled to its attorney's fees incurred in this appeal. Subsequently a specification of attorney's fees was provided to the court and the Environmental Protection Agency submitted a memorandum in opposition to that specification. Subsequent to that, the Northern Plains Resource Council and EPA reached an agreement with respect to fees and the Northern Plains Resource Council submitted an amended specification of attorney's fees. The amended specification was filed in mid-April 1982. Since that date, the undersigned has not received any orders or other approval of the fees agreed to by the parties.

Would you please advise me the present status of the request for attorney's fees.

Sincerely yours,

James A. Patten

JAP/jrg

cc: Counsel of Record